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Public Prosecutor v Thomas Hee Kein Vun

B HIGH COURT (KUCHING) — CRIMINAL APPEAL NO BKI-42–1/1 OF 2018
CHRISTOPHER CHIN JC
10 DECEMBER 2019

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Respondent was found guilty under ss 376(3) and 377 — Sessions court judge sentenced respondent to 15 years imprisonment and ten strokes of whipping for charge under s 376(3) and ten years imprisonment and three strokes of whipping for charge under s 377 of the Penal Code — Whether prosecution had proven its case beyond reasonable doubt — Whether court could convict respondent by relying on evidence of single child witness — Whether learned sessions court judge had directed her mind to all relevant considerations before passing sentence — Whether sentence adequate*

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Evidence — Witness — Child witness — Child witness gave evidence under oath — Enquiry under s 133A of the Evidence Act 1950 conducted — Whether evidence of child witness was consistent and could reasonably be believed — Whether court could accept evidence of single child witness to prove prosecution's case — Evidence Act 1950 s 133A

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The respondent was charged with the offences of attempted rape under s 376(3) of the Penal Code ('the Code') ('the first charge') and committing carnal intercourse against the order of nature without consent under s 377 of the Code ('the second charge'). The respondent in the present case was the step-father of the victim. In March 2015, the victim told her mother that the respondent had attempted to insert his penis into the victim's vagina and anus and she also said the respondent had her sucking on his penis. At the end of the case, the sessions court judge convicted the respondent of both the offences and imposed sentences of 15 years imprisonment from the date of arrest and ten strokes of whipping for the first charge and ten years imprisonment and three strokes of whipping for the second charge. The prosecution had appealed against adequacy of the sentence whereas the respondent had appealed against both the conviction and sentence. The respondent submitted, inter alia, that the victim had contracted herpes and the fact that the respondent was not suffering from herpes, a contagious disease, indicated that the respondent never had sexual contact with the victim.

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Held, dismissing the respondent's appeal and allowing the prosecution's appeal:

(1) The victim was confirmed to have herpes upon examination two days after the alleged incident. However, the respondent was found not to have any symptoms of herpes when he was examined soon after the alleged incident as well. Hence the evidence suggesting the victim contracting herpes from the respondent was not safe to be relied upon and should be disregarded. The learned sessions court judge was wrong to rely on the herpes infection as fact in corroborating the occurrence of the offence. However, the exclusion of the medical evidence (herpes infection and injury to the victim's genitals) purporting to link the respondent to the events of the day of the attempted rape did not automatically means the end to the prosecution's case (see paras 26–28 & 30).

(2) Based on the notes of proceedings ('NOP') of the victim's testimony, the court found her answers to be consistent and clear. The court also found that her version of the events could reasonably be believed. The learned trial judge had already ascertained that she was capable of giving evidence under oath. She gave evidence under oath so s 133A of the Evidence Act 1950 did not apply and her testimony did not mandate corroborative evidence. Further, there was a proper s 133A enquiry undertaken based on the NOP. In the premises and taking into account the detailed examination of the victim's testimony in court, the court was satisfied that the prosecution had proved its case against the respondent beyond reasonable doubt in both charges (see paras 37, 41 & 50–51).

(3) The learned sessions court judge had directed her mind to all the relevant considerations before passing sentence. Therefore, the existing sentences by the learned session court judge was upheld by the court. However, the learned sessions court judge did not indicate if the sentences were to run concurrently or consecutively. The court therefore ruled that they were to run consecutively (see paras 52–53).

[Bahasa Malaysia summary

Responden didakwa atas kesalahan rogol di bawah s 376(3) Kanun Keseksaan ('Kanun') ('pertuduhan pertama') dan melakukan hubungan seks bertentangan dengan aturan tabii tanpa kerelaan di bawah s 377 Kanun ('pertuduhan kedua'). Responden dalam kes ini adalah bapa tiri mangsa. Pada bulan Mac 2015, mangsa memberitahu ibunya bahawa responden telah mencuba memasukkan zakarnya ke dalam faraj dan dubur mangsa dan mangsa juga berkata responden telah mengarahkan mangsa menghisap zakar responden. Di akhir kes, hakim mahkamah sesyen mensabitkan responden di atas kedua-dua kesalahan tersebut dan menjatuhkan hukuman 15 tahun penjara dari tarikh penangkapan dan sepuluh sebatan untuk pertuduhan pertama dan sepuluh tahun penjara dan tiga sebatan untuk pertuduhan kedua. Pihak pendakwaan

telah merayu terhadap kecukupan hukuman manakala responden merayu terhadap kedua-dua sabitan dan hukuman. Responden berhujah, antara lain, bahawa mangsa telah dijangkiti herpes dan hakikat bahawa responden tidak mengalami herpes yang merupakan penyakit berjangkit, menunjukkan bahawa responden tidak pernah berhubungan seks dengan mangsa.

Diputuskan, menolak rayuan responden dan membenarkan rayuan pendakwa raya:

(1) Mangsa disahkan mempunyai herpes setelah pemeriksaan dua hari selepas insiden tersebut. Walau bagaimanapun, responden didapati tidak mempunyai tanda-tanda herpes apabila dia diperiksa tidak lama selepas kejadian tersebut. Oleh itu, adalah tidak selamat untuk bergantung kepada keterangan yang menunjukkan mangsa telah dijangkiti herpes dari responden dan keterangan tersebut harus diabaikan. Hakim mahkamah sesyen yang bijaksanan adalah salah apabila bergantung kepada jangkitan herpes sebagai fakta untuk menyokong berlakunya kesalahan tersebut. Walau bagaimanapun, pengecualian keterangan perubatan (jangkitan herpes dan kecederaan pada alat kelamin mangsa) yang dikatakan mengaitkan responden dengan kejadian cubaan merogol tersebut tidak secara automatik bermakna berakhirnya kes pendakwaan (lihat perenggan 26–28 & 30).

(2) Berdasarkan nota prosiding ('NP') keterangan mangsa, mahkamah mendapati jawapannya adalah konsisten dan jelas. Mahkamah juga mendapati bahawa versi kejadian mangsa boleh dipercayai dengan munasabah. Hakim bicara yang bijaksana juga telah memastikan bahawa mangsa mampu memberikan keterangan bersumpah. Mangsa memberikan keterangan bersumpah, oleh itu s 133A Akta Keterangan 1950 tidak terpakai dan keterangannya tidak memerlukan keterangan menyokong. Selanjutnya, terdapat inkuiri di bawah s 133A yang betul yang dijalankan berdasarkan NP. Bersandarkan kepada sebab-sebab di atas dan dengan mengambil kira pemeriksaan terperinci keterangan mangsa di mahkamah, mahkamah berpuas hati bahawa pihak pendakwaan telah membuktikan kesnya terhadap responden melampaui keraguan munasabah dalam kedua-dua pertuduhan (lihat perenggan 37, 41 & 50–51).

(3) Hakim mahkamah sesyen yang bijaksana telah mengarahkan fikirannya kepada semua pertimbangan yang relevan sebelum menjatuhkan hukuman. Oleh itu, hukuman sedia ada oleh hakim mahkamah sesyen yang bijaksana dikekalkan oleh mahkamah. Walau bagaimanapun, hakim mahkamah sesyen yang bijaksana tidak menyatakan sama ada hukuman tersebut berjalan secara serentak atau berasingan. Oleh itu mahkamah memutuskan bahawa hukuman-hukuman tersebut berjalan secara berasingan (lihat perenggan 52–53).]

Cases referred to

Kwan Peng Hong v PP [2000] 4 SLR 96, HC (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
State of Punjab v Rakesh Kumar Criminal Appeal No 1365 of 2008 (refd)

Legislation referred to

Evidence Act 1950 ss 133A, 134
Penal Code ss 377C, 511

Mohd Khairuddin bin Idris (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Rakhbir Singh (Rakhbir Singh & Co) for the respondent.

Christopher Chin JC:

APPEAL

[1] (a) By the accused against conviction and sentence; and

(b) by the prosecution against sentence

CHARGES

[2] First Charge: s 376(3) read with s 511 (attempt to rape) 20 March 2015.

Second Charge: s 377C of the PC (committing carnal intercourse against the order of nature without consent) 19 March 2015.

ACCUSED

[3] 34 years old, Chinese, stepfather to the victim.

VICTIM

[4] 13 years old, Chinese.

SENTENCE PROVIDED BY LAW

[5] First: Imprisonment not less than eight years, and not more than 15 years, and shall also be punished with whipping of not less than ten strokes.

Second: Imprisonment not less than five years and not more than twenty years, and shall also be liable to whipping.

A SENTENCE IMPOSED

[6] First: 15 years from the date of arrest and ten strokes of whipping.

B Second: ten years imprisonment and three strokes of whipping.

BRIEF FACTS

[7] In March 2015, the child victim told her mother that the accused had
C been molesting her since she was nine years old and had attempted to insert his penis into the victim's vagina and anus. She also said the accused had her sucking on his penis.

ISSUES RAISED BY THE DEFENCE

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[8] The mother's evidence as follows:

(a) that the ulcer on her daughter's genital may be caused by a hygiene wash product; and

E (b) admits that her daughter could be making up the allegations (p 37) and that she does not believe her daughter.

[9] Victim's hymen was intact.

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[10] The victim had contracted herpes, serious condition (examination on 23 March 2015), but the accused is negative for herpes (examination on 31 March 2015) (pp 195–197).

G **[11]** On the incident dates, there were two persons in the house when the victim came back from tuition (p 133) (the accused and his brother, Jeremy). But the accused's brother was not called to testify as witness to explain what happened on that day, because he was in the living room.

H **[12]** Child victim said there were other persons who had molested her; her cousins (*abang sepupu*), Nolong and Kolop (rubbed penis on her vagina, ejaculated on her).

I **[13]** There was also suggestion that the victim was intimate with one of the four tenants in the house.

[14] They were also not called as witnesses, never tested for herpes. Herpes is contagious and is contactable via sexual contact, saliva, sperm.

[15] The fact that the accused was not suffering from herpes, a contagious disease, indicated that the accused never had sexual contact with the victim.

ISSUES RAISED BY THE PROSECUTION

[16] That the victim is under 16 years old.

[17] That the accused was the victim's stepfather.

[18] There was an attempt of penetration, based on the testimonies of the child victim.

[19] The child victim contacted herpes. This was corroborative evidence. Based on the victim's testimony, this was the first time she was infected by herpes. The victim stated that the accused spat on her vagina and attempted to penetrate her.

JUDGE'S GROUND FOR CONVICTION

[20] The judge found that the prosecution proved prima facie case because there was attempted penetration, based on the evidence of the child and the evidence of the O&G Specialist and the medical report. The judge ruled that the accused's testimonies in his defense were mere denial.

[21] Line 291 of grounds of judgment:

> The testimony of the O&G Specialist (PW8) and her medical report (Exhibit P7) corroborated the testimony of attempted rape.

GROUNDS FOR SENTENCING

[22] Grounds for sentencing are as follows:

(a) public interest;

(b) seriousness of the offence;

(c) the accused was an authoritative figure to the victim;

(d) attempt — punishment was one half of the maximum; and

(e) full trial.

BROAD GROUNDS TO DECISION

The law

[23] The two charges do not require sexual intercourse to be proved to have taken place so the fact that the victim's hymen was intact and not torn is not fatal to the prosecution's case.

[24] To constitute attempted rape the learned DPP submitted as follows which I believe was extracted from *State of Punjab v Rakesh Kumar* Criminal Appeal No 1365 of 2008:

> In the crime of rape, 'carnal knowledge' means penetration to any of the slightest degree of the organ alleged to have carnally known by the male organ of generation. Even slight penetration is sufficient and emission is unnecessary. Even the slightest degree of penetration is sufficient to prove sexual intercourse. It is a violation of the private person of a woman — an outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order.

According to the victim (PW7) the accused had attempted to penetrated his penis into her vagina.

[25] *Medical Jurisprudence and Toxicology* (21st Ed — Modi) reads as:

> Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rapture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt to at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case a medical officer should mention the negative facts in his report, but should not give his opinion that no rape has been committed. Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence if recent sexual activity. Whether the rape has occurred or not is a legal conclusion not a medical one.

Herpes

[26] Taking into account the result of the medical inspection on both the victim and the accused and also taking into account the characteristics of herpes in particular its incubation period before the disease flares up and the time it normally takes for lesions to heal; it is clear that the victim did not contract herpes from the accused on the date of the alleged offence.

[27] When the victim came home from school on the 20 March 2015, she complained to the accused of discomfort in her private parts. This is likely due to the full-blown herpes lesions she was *already* suffering from *before* the alleged incident:

Q95 : Pada 12 tengahari, 20.03.2015, di rumah kamu itu, apa yang berlaku?

A : Waktu saya balik dari sekolah, saya bagitahu yang kemaluan saya telah berbiji dan gatal

[28] The victim was confirmed to have herpes upon examination two days after the alleged incident. However, the accused was found not to have any manifested symptoms of herpes when he was examined soon after the alleged incident as well.

[29] Hence the evidence suggesting the victim contracting herpes from the accused is not safe to be relied upon and should be disregarded.

[30] I find that the learned sessions court judge was wrong to rely on the herpes infection as fact in corroborating the occurrence of the offence.

Residual evidence

[31] If I were to disregard this finding of fact by the learned judge and his conclusion derived therefrom, is the conviction still safe? We are left with the evidence of the victim. I had the opportunity to study the transcript of the notes of proceedings with particular reference to the testimony of PW7, the victim and the defence's cross-examination of her.

[32] We then need to evaluate the residual evidence to see if the ingredients of the offence have been proved and therefore the conviction is safe. The exclusion of the medical evidence (herpes infection and injury to the victim's genitals) purporting to link the accused to the events of the day of the attempted rape does not automatically means the end to the prosecution's case.

[33] While one aspect of the case cannot be believed is no ground to disregard the other evidence available for evaluation.

[34] Without the medical evidence (the herpes infection and injury to the victim's genitals) we are left with the testimony of PW7, the victim herself. She was 13 when the incident took place and was aged 14 when she testified. Section 133A of the Evidence Act comes into play.

[35] Based on the notes of proceedings, the court, the DPP and the defence questioned the victims first in a s 133A enquiry and she was then sworn in as a prosecution's witness, PW7, after the court ruled, inter alia, that she was capable of understanding the meaning of giving evidence under oath.

[36] The defence argues that the other person who was present in the house (at least on 19 March 2015) being the accused's brother, was not called to testify as to what really happened on the day in particular whether the accused did call the victim into his bedroom;

[37] There was evidence from PW7 (the victim herself) of the other persons molesting her (Lolong and Kolop). They were also not called as witnesses by the prosecution.

[38] The alternative limb of the defence's argument is that the victim conjured up this whole storey so that the accused will be divorced from the victim's mother and reunite with her biological father. It is noted that the report leading to the arrest of the accused was not made by the victim PW7.

[39] Reading the notes of proceedings of PW7's testimony in examination and chief right down to her re-examination by the learned DPP, I found her answers to be consistent and clear. I also find that her version of the events she could reasonably be believed. There may be some discrepancies on the timing of certain events but I am of the opinion that these are not fatal to the reception of her evidence. I must also remember that this is the clear narration of the events from a child barely in her teens at 14. The learned trial judge had already ascertained that she was capable of giving evidence under oath. She could also clarify for instance, that she never made a report against the accused and that the report was in fact made by the Likas Woman and Children Hospital.

[40] In *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 where Raja Azlan Shah FJ (as His Highness then was) said:

> ... In my opinion, the discrepancies there will always be, because in the circumstances in which events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. The question is whether existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and reject the other. In the absence of any contradiction, however, and in the absence of any inherent improbability, the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted.

[41] Defence argued that there was evidence of other people in the house and that the victim had been 'disturbed' by them as well. Much was said about the victim's cousins of Lolong and Kolok among others such as the accused's brother. The argument was that they were not called to testify on what they observed on that day. I see little merit in this argument. Lolong and Kolok are not on trial here.

[42] The rape did not occur in the clear sight of third parties, it very seldom is.

[43] She gave evidence under oath so s 133A of the Evidence Act does not apply and her testimony does not mandate corroborative evidence. While the victim was 13 years of age (born in 14 December 2003) during the attempted rape in March 2015, the trial took palace in 2017 when the victim was by then 14 years of age. There was a proper s 133A enquiry undertaken based on the NOP from p 105 et seq. The NOP states the court held:

> Through a series of questions by the Court, defence counsel and DPP, the Court is of the considered view that this witness understands the duty to speak the truth and possesses sufficient intelligence to justify the reception of evidence and this child is a competent witness to testify under oath. Hence this witness will give evidence under oath.

[44] The victim affirmed and gave evidence in Bahasa Malaysia.

[45] I understand that the court must exercise caution to convict on the words of the victim alone. Yong Pung How CJ in *Kwan Peng Hong v Public Prosecutor* [2000] 4 SLR 96 said:

> But I also took great care to make clear that it is dangerous to convict on the words of the complainant alone unless her evidence is unusually compelling or convincing (*Tang Kin Seng v PP* [1971] 1 SLR 46 at p 48) and others. In short, the court is to be extremely cautious in relying on the sole evidence of the complainant for a conviction. The phrase 'unusually compelling or convincing' simply means that the complainant's evidence was so convincing that the prosecution's case was proven beyond reasonable doubt, only on the basis of that evidence.

[46] Can the court accept just a single witness to prove the case of the prosecution? The answer to this comes from s 134 of the Evidence Act 1950:

> Section 134 — No particular number of witnesses shall in any case be required for the proof of any fact.

[47] *Ratanlal and Dhirajlal's Law of Crimes* (27th Ed) at pp 1965–1969 referred to the testimony of victims:

> Evidence of prosecutrix — It is no doubt true in law the conviction of an accused on the basis of the testimony of the prosecutrix alone is permissible, but that is in a case where the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. In the matter of rape, the statement of the prosecutrix must be given primary consideration, but the prosecution has to prove its case beyond reasonable doubt and there can be no presumption that a prosecutrix would always tell the entire story truthfully. It is now a well settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. In a case of rape, particularly when the victims are illiterate, uneducated, their statements

A have to be accepted in toto without further corroboration. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. The main evidence in all such cases is that of the victim herself. The prosecutrix of a sex offence is a victim of a crime … The testimony of the prosecutrix, if found to be reliable by itself may be sufficient to convict the culprit B and no corroboration of her evidence is necessary. In prosecution of rape, the law does not require corroboration.

[48] As indicated earlier, I am satisfied as to the credibility of PW7 (the victim).

C

[49] Lastly there is no doubt in my mind as to the relationship between the accused and the victim. There is clear uncontroverted evidence that the accused is married to the victim's mother and is thus the stepfather to the victim. The victim has the product of the union between her mother and her first husband.

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[50] The victim's birth certificate (P9) was also produced to show that she was below the age of 16 at the time of the incident.

E **[51]** The following excerpts are an example of the clarity of PW7's evidence:

Q95	:	Pada 12 tengahari, 20.03.2015, di rumah kamu itu, apa yang berlaku?
A	:	Waktu saya balik dari sekolah, saya bagitahu yang kemaluan saya telah berbiji dan gatal.
F Q96	:	Kamu beritahu siapa?
A	:	Ayah tiri saya.
Q97	:	Kemudian, selepas kamu beritahu, apa yang Ayah tiri kamu cakap?
A	:	Dia cakap itu cuma biji panas.
Q98	:	Bagaimana dia tahu itu biji panas, dia ada tengok?
G A	:	Ada.
Q99	:	Kenapa dia tengok kemaluan kamu?
A	:	Sebab ada biji-biji.
Q100	:	Siapa yang suruh kamu tunjuk kemaluan kamu?
A	:	Ayah tiri saya.
H Q101	:	Selepas dia tengok kemaluan kamu, apa yang dia buat?
A	:	Dia suruh saya pergi cuci kemaluan saya di tandas.
Q102	:	Kamu ada cuci kemaluan kamu apabila Ayah tiri kamu suruh cuci kemaluan kamu?
I A	:	Ada.
Q103	:	Kamu pernah sakit di kemaluan sebelum kejadian?
A	:	Tidak pernah.
Q104	:	Jadi, itu kali pertama kamu sakit di kemaluan?
A	:	Ya.

Q105	:	Selepas kamu cuci kemaluan kamu, apa yang berlaku selepas itu?
A	:	Dia suruh saya buka seluar, bagi kemaluan saya jadi saya terpaksa saya bagi sebab banyak sudah barang dia tapuk (sembunyi). Jadi saya terpaksa bagilah.
Q106	:	Apa Ayah tiri kamu cakap dengan kamu pada waktu itu?
A	:	Dia cakap 'satu kali', jadi saya tahulah.
Q107	:	Kemudian apa yang ayah tiri kamu buat selepas dia suruh kamu buka seluar?
A	:	Dia buang air liur dia di kemaluan saya, dia cuba masukkan kemaluan dia ke kemaluan saya tetapi termasuk sikit sahaja lepas itu, saya cakap 'sakit' terus dia berhenti. Dia suruh saya pergi cuci kemaluan saya di tandas bilik mummy saya. Saya pun ikut sahaja. Selepas itu, saya pergi tidur.
Q108	:	Ada kamu jerit pada masa itu?
A	:	Tidak ada.
Q109	:	Kenapa kamu tidak jerit?
A	:	Takut.
Q110	:	Takut dengan siapa?
A	:	Ayah tiri saya
Q111	:	Kenapa kamu takut dengan Ayah tiri kamu, ada dia buat apa-apa dengan kamu?
A	:	Tiada, tapi dia ada tapuk (sembunyi) barang-barang saya. Saya takut dia marah.

[52] I am satisfied that on the totality of the evidence by PW7 ('the victim') alone, the various tests in the authorities and academic practitioner's to me cited above have been satisfied in favour of the prosecution's case.

JUDGMENT

[53] In the premises and taking into account the detailed examination of the victim (PW7)'s testimony in court I am satisfied that the prosecution has proved its case against the accused beyond reasonable doubt in both charges. The appeal by the accused against conviction is not successful.

[54] I have also studied the learned session court judge's reasoning prior to sentencing and I am satisfied that she has directed her mind to all the relevant considerations before passing sentence. The existing sentences by the learned session court judge is upheld.

[55] However, the learned sessions court judge did not indicate if the sentences were to run concurrently or consecutively. I rule that they are to run consecutively. The prosecution's appeal on the adequacy of the sentence is allowed.

Respondent's appeal dismissed; prosecution's appeal allowed.

Reported by Dzulqarnain Ab Fatar